

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION)	CASE NO. 1:17-MD-2804
OPIATE LITIGATION)	
)	JUDGE DAN A. POLSTER
)	
)	
)	
)	<u>NOTICE OF COMPLIANCE</u>
)	

PLEASE TAKE NOTICE that the United States of America received requests for the disclosure of official Department of Justice (“DOJ”) information in the above-captioned case. Specifically, on or about May 12, 2023, DOJ received a subpoena and *Touhy* request from Plaintiff Executive Committee (herein after “PEC”) seeking the Drug Enforcement Administration (“DEA”) to provide transactional Automated Records and Consolidated Orders System (“ARCOS”) data for prescription buprenorphine, codeine, dihydrocodeine, fentanyl, hydrocodone, hydromorphone, levorphanol, meperidine, methadone, morphine, opium powdered, oxycodone, oxymorphone, and tapentadol transactions in all states and territories in the United States for the period of January 1, 2015 through December 31, 2019. On May 25, 2023, the DOJ objected to the subpoena on the grounds of failure to allow a reasonable time for compliance, undue burden, relevance, the requested discovery was not proportional to the needs of the case at the current juncture, and that the data sought may be barred from disclosure pursuant to the law enforcement and investigative privileges. PEC filed a motion to enforce its subpoena issued to DEA dated June 8, 2023. (*See* ECF No. 5072.) DOJ’s response is dated June 15, 2023. (*Id.*) The PEC filed a reply on July 7, 2023. (ECF No. 5109.) On July 14, 2023, this

Court issued an order granting the PEC's motion to enforce its May 11, 2023, subpoena. (ECF No. 5115.)

Federal regulations govern the disclosure of official information by DOJ employees and prohibit personnel from testifying absent express authorization. 28 C.F.R. § 16.22(a). The United States Supreme Court has long recognized the authority of agency heads to restrict the testimony of their subordinates through regulations. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). These regulations are called "*Touhy* Regulations." In the *Touhy* decision, the United States Supreme Court held that a subordinate federal officer could not be found in contempt of court for refusing to produce subpoenaed documents, where his refusal was based on DOJ regulations prohibiting the disclosure of nonpublic documents without authorization of the Attorney General. *Id.* at 466. The Court rejected the contention that the regulation invaded the authority of the Courts to determine the admissibility of evidence. *Id.* at 468.

In compliance with the Court's Order dated July 14, 2023 (ECF No. 5115), the United States Drug Enforcement Administration ("DEA") disclosed on August 14, 2023, an encrypted link containing complete transactional ARCOS data for prescription buprenorphine, codeine, dihydrocodeine, fentanyl, hydrocodone, hydromorphone, levorphanol, meperidine, methadone, morphine, opium powdered, oxycodone, oxymorphone, and tapentadol transactions in all states and territories in the United States for the period of January 1, 2015 through December 31, 2019 to the following individuals designated by Plaintiffs:

1. Lacey Keller, MK Analytics, Inc.
2. Craig McCann, SLCG Economic Consulting
3. Josh Gay, Levin, Papantonio Rafferty

In order for this production to mirror what occurred in 2018 and to be made as soon as reasonably possible, the dataset has not been subject to DEA's most recent validation protocol typically applied to ARCOS data before its release to the public. Thus, while the data has been subjected to a similar protocol as the previous tranches of ARCOS data produced in 2018, it has not been subject to the more recent and robust validation process.

Respectfully submitted,

REBECCA C. LUTZKO
UNITED STATES ATTORNEY
Northern District of Ohio

By: /s/ James R. Bennett II
JAMES R. BENNETT II (OH #0071663)
RENEE A. BACCHUS (OH #0063676)
Assistant U.S. Attorneys
Carl B. Stokes U.S. Courthouse
801 West Superior Avenue, Suite 400
Cleveland, Ohio 44113-1852
Telephone: (216) 622-3600
Facsimile: (216) 522-4982
E-mail: James.Bennett4@usdoj.gov
E-mail: Renee.Bacchus@usdoj.gov

Attorneys for United States Department of Justice,
Drug Enforcement Administration